Ahmad Sukeri bin Ibrahim v Mohd Faizal bin Adnan

HIGH COURT (ALOR SETAR) — CIVIL APPEAL NO 12(B)NCVC–107–07 OF 2012
SEE MEE CHUN JC
12 AUGUST 2013

Tort — Negligence — Road accident — Collision involving motorbikes — Apportionment of liability — Appeal against — Defendant denied that he or his motorbike involved in accident — Whether evidence of SP2 and SP8 on the accident credible or cogent — Whether eyewitness independent witness with no interest — Whether plaintiff established his case — Whether appropriate to invoke adverse inference for defendant's failure to give evidence

This appeal was concerning a motor vehicle accident between the plaintiff and the defendant who were both riding motorbikes and were involved in an accident that took place around 8.30pm. As a result of the said accident, the plaintiff sustained severe cerebral concussion and other injuries as well. The sessions court found the defendant fully liable. On an appeal to the High Court on liability and quantum, the defendant's appeal on liability was allowed and the plaintiff's claim was dismissed. The plaintiff now appeals on the issue of liability. The defendant's defence was one of denial that neither he nor his motorbike were involved in the accident. In the alternative, the defendant pleaded that the accident was attributed to the negligence or contributed to by the plaintiff. SP2, the investigation officer, had only arrived at the scene of the accident some 13 hours after the accident and the motorbikes were inspected at a nearby house. According to SP2, he did not know the position of the motorbikes after the accident or how they ended up at the nearby house. The defendant had been issued with a summons under reg 3 some one year after the accident. SP3, the plaintiff's father who was attached to IPD Sik, stated that his son was involved in the accident with the defendant and he had lodged a police report. SP8, who was acquainted with SP3, stated in his evidence that he witnessed the accident from around 50 meters. He further stated that he saw a motorcar rendering assistance but he did not personally go near to see the accident. He stated that this information was given by him to the investigation officer but no police report was made.

Held, allowing the defendant's appeal on liability:

(1) Looking at the evidence of the SP2, he had arrived at the scene of accident a good 13 hours later. The motorbikes had been removed and he did not know how they were at a nearby house. He could not be sure if it was the defendant who was involved in the accident. Although he said there was

a witness who saw the accident, he then said that the witness did not witness the accident. He had ascertained the direction of the defendant's motorbike from SP8. SP2's evidence was thus reliant on the statement given by SP8 and yet SP2 said SP8 did not witness the accident (see para 13).

(2) Bearing in mind the accident happened around 8.30pm and SP2's evidence that it was 'agak gelap, lampu jalan jauh' ('quite dark, the street light being far away'), it was not probable that SP8 saw anything. His action or complete lack of action was not consistent with that of a police officer, what more in the traffic section, regardless of the fact that he was off duty. He did not lodge a report despite having witnessed an accident even though he thought it was a minor one (see para 14).

(3) The evidence of SP2 and SP8 were not credible or cogent. The fact that plaintiff was the son of a fellow colleague may have influenced the evidence. This was therefore a fit and proper case for the court to interfere with the findings of the sessions court (see para 15).

(4) It was for the plaintiff to first establish his case. In this instance, the plaintiff had not done so and it does not lie on this court to invoke an adverse inference on defendant's failure to give evidence (see para 17).

[Bahasa Malaysia summary

Rayuan ini adalah berkaitan kemalangan kenderaan antara plaintif dan defendan yang kedua-dua mereka menunggang motosikal dan terlibat dalam kemalangan yang terjadi lebih kurang pukul 8.30 malam. Akibat kemalangan tersebut, plaintif mengalami konkusi serebrum yang parah dan kecederaan-kecederaan yang lain juga. Mahkamah sesyen mendapati defendan bertanggungjawab sepenuhnya. Atas rayuan ke Mahkamah Tinggi atas liabiliti dan kuantum, rayuan defendan atas liabiliti dibenarkan dan tuntutan plaintif ditolak. Plaintif sekarang merayu atas isu liabiliti. Pembelaan defendan adalah satu penafian bahawa tidak dia atau motosikalnya terlibat dalam kemalangan tersebut. Dalam alternatif, defendan mempli bahawa kemalangan berpunca daripada kecuaian atau disebabkan oleh plaintif. SP2, pegawai penyiasat, hanya tiba di tempat kemalangan 13 jam selepas kemalangant dan motosikal-motosikal diperiksa di rumah berdekatan. Mengikut SP2, dia tidak tahu kedudukan motosikal-motosikal selepas kemalangan atau bagaimana ia kesudahannya di rumah berdekatan. Defendan telah disaman di bawah peraturan 3 lebih kurang satu tahun selepas kemalangan tersebut. SP3, bapa plaintif yang berkhidmat di IPD Sik, menyatakan anaknya terlibat dalam kemalangan dengan defendan dan dia membuat laporan polis. SP8, yang mengenali SP3, menyatakan dalam keterangannya bahawa di telah menyaksikan kemalangan dari jarak lebih kurang 50 meter. Dia selanjutnya menyatakan bahawa dia melihat motokar memberi bantuan tetapi tidak secara peribadi pergi berdekatan untuk melihat kemalangan tersebut. Dia

menyatakan bahawa maklumat ini diberikan olehnya kepada pegawai penyiasat tetapi tiada laporan polis dibuat.

Diputuskan, membenarkan rayuan defendan atas liabiliti:

(1) Melihat kepada keterangan SP2, dia tiba di tempat kemalangan 13 jam kemudian. Motosikal-motosikal telah dipindahkan dan dia tidak tahu bagaimana ia berada di rumah berdekatan. Dia tidak begitu pasti jika ia adalah defendan yang terlibat di dalam kemalangan. Walaupun dia menyatakan terdapat saksi yang melihat kemalangan, dia kemudiannya menyatakan bahawa saksi tersebut tidak menyaksikan kemalangan tersebut. Dia telah memastikan arah motosikal defendan daripada SP8. Keterangan SP2 oleh itu bergantung ke atas penyataan yang diberikan oleh SP8 tetapi SP2 menyatakan SP8 tidak menyaksikan kemalangan tersebut (lihat perenggan 13).

(2) Mengambil kira kemalangan berlaku lebih kurang pukul 8.30 malam dan keterangan SP2 bahawa adalah 'agak gelap, lampu jalan jauh' ('quite dark, the street light being far away'), SP8 kemungkinan tidak nampak apa-apa. Tindakannya atau langsung tidak bertindak tidak konsisten dengan keterangan pegawai polis, apa lagi di bahagian trafik, tanpa mempedulikan fakta yang dia tidak bertugas. Dia tidak membuat laporan meskipun menyaksikan kemalangan walaupun dia beranggapan ia hanya kemalangan kecil (lihat perenggan 14).

(3) Keterangan SP2 dan SP8 tidak boleh dipercayai atau meyakinkan. Fakta bahawa plaintif adalah anak kepada rakan sekerja mungkin mempengaruhi keterangan. Oleh itu ini adalah kes yang wajar dan betul untuk mahkamah campur tangan dengan dapatan mahkamah sesyen (lihat perenggan 15).

(4) Plaintiff seharusnya membuktikan kesnya terlebih dahulu. Dalam kes ini, plaintif tidak berbuat sedemikian dan bukan terletak ke atas mahkamah ini untuk membangkitkan inferens bertentangan di atas kegagalan defendan untuk memberi keterangan (lihat perenggan 17).]

Notes

For cases on road accident, see 12(1) *Mallal's Digest* (4th Ed, 2103 Reissue) paras 1601–1960.

Cases referred to

Lee Cher Phow & Ors v Pua Yong Yong & Anor [2011] MLJU 1195; [2012] 1 MLRH 793, HC (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395; [1996] 3 AMR 3506, CA (refd)

Legislation referred to

Evidence Act 1950 s 101(1)
Road Transport Act 1987 s 43

Sri Tharan Vello (Selvi Subra & Associates) for the plaintiff.
Sunita Kaur Sandhu (Ajmer, Sandhu & Ong) for the defendant.

See Mee Chun JC:

[1] This appeal concerns an accident on 16 December 2008 between the plaintiff who was riding motorbike KCH 4316 and the defendant who was riding motorbike KAD 3317. The plaintiff sustained severe cerebral concussion and other injuries as well. At the sessions court the defendant was held 100% liable. The defendant appealed on liability and quantum. At the High Court, the defendant's appeal on liability was allowed and the plaintiff's claim was dismissed. The plaintiff now appeals on the issue of liability.

[2] In para 3 of the statement of claim is pleaded:

> … semasa Plaintif sedang menunggang Motosikal No KCH 4316 dari Batu 5 hendak ke Pekan Sik dan apabila sampai di Jalan Charuk Padang, Sik, tiba-tiba Defendan yang berada di arah bertentangan dengan begitu cuai dalam menunggang, mengurus dan mengawal Motosikal No KAD 3317 telah secara tiba-tiba melintas dari arah sebelah kanan jalan ke kiri jalan dan menceroboh laluan Plaintif dan menyebabkan perlanggaran dengan Motosikal Plaintif.

[3] Defence of the defendant is one of denial that he or his motorbike was not involved in the accident (para 6 of defence). In para 7 an alternative defence is pleaded where the accident is attributed to the negligence or contributed to by the plaintiff.

[4] The plaintiff had called eight witnesses, three of whom relate to the issue of liability. They are SP2 (Rasdi bin Said, investigation officer), SP3 (Adnan bin Ibrahim, the plaintiff's father) and SP8 (Mohd Fauzi bin Mohd Hashim, eyewitness). SP7 (Syed Idzahar bin Syed Idrus, photographer) evidence related to the photographs taken and he could not remember when he arrived at the scene of accident. On the hearing of the appeal both counsels agreed that SP2 had first arrived at the scene 13 hours after the accident and the motorbikes were inspected at a nearby house. SP2 had stated he went with SP7 at around 9.40am on 17 December 2008 and hence the photographs would have been taken 13 hours after the accident.

[5] The sketch plan is in pp 141–142 of *rekod rayuan* ('RR') and according to SP2, the plaintiff was from *bawah ke atas and defendant dari bawah kanan ke*

kiri ke atas. He was not sure 'B' which indicated *kesan celah* and 'C' which indicated *komponen kenderaan* came from which motorbike. This was *kawasan kampung and 'agak gelap. Lampu jalan jauh'.* He did not know the position of the motorbikes after the accident or how they ended up at the nearby house. He agreed the eyewitness did not witness the accident. He further agreed he 'tidak dapat pastikan KAD 3317 telah mengakibatkan kecederaan kepada plaintif' (p 34 *rekod rayuan* ('RR')). After he retired on 1 January 2010 the investigation papers were handed to his superior officers one of whom was SP3. The defendant had been issued a summons under reg 3 for not giving right of way to traffic from the main road. It was also agreed by both counsels the evidence showed the summons was issued one year after the accident, DPP had not agreed to the recommendation that the case was under s 43 of the Road Transport Act 1987 and the basis of the summons was wrong. In re-examination SP2 stated the plaintiff had not made any report due to the serious injuries sustained. The direction of the defendant's motorbike was ascertained through SP8. The summons would only be issued upon sufficient proof.

[6] SP3 was attached to IPD Sik at time of the accident. It was his evidence his son was involved in the accident with the defendant and he had lodged a police report. In cross-examination he stated the defendant was attached to Traffic Section of IPD Sik, and that SP2 was his subordinate. He disagreed he did not know which motorbike had been involved in the accident with the plaintiff.

[7] SP8 gave evidence on the night of the accident he was not on duty and had gone out for a meal. He was from Sik to Jeniang and as per sketch plan from *atas ke bawah*. He witnessed the accident. The evidence is as at pp 58–59 of RR as follows:

> Peguam: Bagaimana kemalangan berlaku?
>
> Saksi: Saya memandu motorvan dari Sik. Apabila sampai di tempat kejadian, saya ternampak satu motosikal di laluan saya secara berhadapan di kirijalan saya. Motosikal tersebut cross dari kiri ke kanan masuk ke arah Pekan Sik. Kemudian satu motosikal dari Batu 5 telah melanggar motosikal tersebut.
>
> Peguam: Ikut rajah kasar. Dari mana?
>
> Saksi: Dari A4 ke A2
>
> Peguam: Motosikal satu lagi dari mana?
>
> Saksi: Dari A2 (dari arah Bt 5)
>
> Peguam: Kemalangan tersebut di mana?
>
> Saksi: Di belakang motorkar saya

Peguam: Perlanggaran berlaku di mana?

Saksi: A2

[8] SP8 stopped around 50 meters in front and saw a motorcar rendering assistance. He continued with his journey. He gave a statement to the investigation officer but did not make a police report. In cross-examination he stated he was alone in his car. He is acquainted with SP3. He did not go near to see the accident. He agreed as a police officer he ought to make a report and since he had witnessed the accident he should have made a report. He agreed to the following questions at pp 60–61 of RR:

Peguam: Kamu tidak maklumkan mengenai kemalangan ini secepat mungkin

Saksi: Setuju.

Peguam: Kamu tidak ada halangan untuk buat report polis.

Saksi: Setuju.

Peguam: Kamu juga ada kesempatan untuk buat report.

Saksi: Setuju.

Peguam: Kamu masih tidak buat report.

Saksi: Setuju.

Peguam: Segala keterangan kamu tidak terkandung dalam sebarang repot.

Saksi: Setuju.

Peguam: Kamu beredar terus dari tempat kejadian.

Saksi: Setuju.

[9] He disagreed he did not witness the accident and he did not see the number plate of the motorcar which had stopped. He disagreed there was no such motorcar. He further disagreed to the following questions at p 61 of RR:

Peguam: Motorkar yang berhenti tersebut, sebenarnya tidak wujud.

Saksi: Tidak setuju.

Peguam: Awak tidak ada pengetahuan mengenai kemalangan tersebut.

Saksi: Tidak setuju.

Peguam: Segala keterangan kamu mengenai motosikal tersebut melintas adalah tidak benar.

Saksi: Tidak setuju.

Peguam: Kamu bukan saksi kemalangan.

Saksi: Tidak setuju.

[10] In re-examination he said at the time of accident he did not know SP3's son was involved. He did not lodge a report as he thought it involved minor injuries and there was no necessity to wait as he had a dinner appointment. He was present when he accident happened and he witnessed it.

[11] The defendant did not give evidence.

[12] At para 6 of the grounds of judgment (p 11 *rekod rayuan tambahan*) the sessions judge stated:

> Berdasarkan keterangan pegawai penyiasat, SP8 dan dengan kegagalan Defendan dipanggil memberikan keterangan, maka mahkamah memutuskan bahawa kemalangan di antara motosikal KAD 3317 dan KCH 4316 telah berjaya dibuktikan sebagaimana diplidkan di dalam pemyataan tuntutan.

[13] However looking at the evidence of the investigation officer ('SP2') he had arrived at the scene of accident a good 13 hours later. The motorbikes had been removed and he did not know how they were at a nearby house. He could not be sure if it was the defendant who was involved in the accident. Although he said there was a witness who saw the accident he then said that witness did not *melihat kemalangan*. He had ascertained the direction of the defendant's motorbike from this witness, who is SP8. SP2's evidence is thus reliant on the statement given by SP8 and yet SP2 said SP8 did not witness the accident.

[14] SP2 had referred to SP8 as *saksi bebas*. From SP8's own evidence the accident took place 'di belakang motorkar saya'. Bearing in mind this was around 8.30pm and SP2's evidence it was 'agak gelap, lampu jalan jauh' I do think it probable SP8 saw anything. His action or complete lack of action is not consistent with that a police officer what more in the traffic section, although he said he was off duty. He did not lodge a report despite having witnessed an accident even though he thought it was a minor one.

[15] In light of the above I did not find the evidence of SP2 and SP8 credible or cogent. The fact that the plaintiff is the son of a fellow colleague may have influenced the evidence. This was therefore a fit and proper case for the court to interfere with the findings of the sessions court. Refer to *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 3 AMR 3506.

[16] As to the adverse inference being invoked against the defendant for his failure to give evidence (para 4, grounds at p 11 *rekod rayuan tambahan*) it is for the plaintiff to prove his case. *Lee Cher Phow & Ors v Pua Yong Yong & Anor* [2011] MLJU 1195; [2012] 1 MLRH 793 it was stated at p 798:

It is settled law that the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s 101(1) of the Evidence Act 1950). The burden of proof on that party is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this case the burden of proof is on the the plaintiffs to establish their case. If they fail to do so, it will not do for the the plaintiffs to say that the the defendants have not established their defence.

[17] It therefore falls on the plaintiff to first establish his case. In this instance the plaintiff has not done so and it does not lie on this court to invoke an adverse inference on the defendant's failure to give evidence to now say the defendant has not proved its case. The defendant's main defence was one of denial and rightly so as it was pleaded he was not involved in the accident. The police report of the defendant in p 139 RR of his involvement was not an exhibit.

[18] The defendant's appeal on liability was therefore allowed.

Defendant's appeal on liability allowed.

Reported by Ashgar Ali Ali Mohamed